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Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 415

UNITED STATES OF AMERICA,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Subject Index.

Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	15

Table of Authorities Cited.

CASES.

Atlantic Coast Line R. Co. v. United States, 140 F. Supp. 569	10
Grand Trunk Western Railway Co. v. United States, 252 U.S. 112	8
Grand Trunk Western Railway Co. v. United States, 53 Ct. Cl. 473	8
United States v. Norwegian Barque "Thekla," Her Tackle, Etc., 266 U.S. 328	7

STATUTES, ETC.

Interstate Commerce Act, sec. 3 (2)	13*n*.
Transportation Act of September 18, 1940, sec. 322, 54 Stat. 955, 49 U.S.C. 66	2, 4, 5, 6, 11, 13, 14, 15
Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346 (a) (2)	3
Interstate Commerce Commission Rules, Rule 34, sec. 6(a)	4
Interstate Commerce Commission Service Order No. 68	4, 5

TEXTBOOK.

Wigmore on Evidence, vol. IX, sec. 2486, p. 275	9*n*.

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 574.

UNITED STATES OF AMERICA,
Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The oral opinion of the United States District Court for the District of Massachusetts (R. 39) is not reported. The opinion of the Court of Appeals is reported at 236 F. (2d) 101.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

1. Whether section 322 of the Transportation Act of 1940 abrogates the well-established rule that the party litigant alleging a claim must prove that claim.

2. Whether said Act places upon the carrier-plaintiff the burden of setting forth in its complaint anything with respect to prior transportation contracts between the parties; or of making any showing that on an overall basis the Government-defendant has not overpaid the carrier.

3. Whether said Act permits the Government as a counter-claimant to recover in set-off on the basis of an overpayment without sustaining the burden of proving such overpayment.

Statute Involved.

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the

amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

Statement.

This action was brought by the respondent; The New York, New Haven and Hartford Railroad Company, under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346 (a) (2), to recover from the United States sums due for transportation services performed by the Railroad in the carriage of Government property in the year 1950 (R. 3-4). The pertinent facts in the case may be summarized as follows:

On August 8, 1950, the respondent delivered a carload of household effects to the petitioner at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the petitioner and bearing Government bill of lading No. N. 17377374 (R. 3). The lawful charges for these transportation services under applicable tariffs were $1143.03 (R. 3). The respondent on June 14, 1951, made demand upon the United States for payment of this sum, which demand was refused with the exception of the sum of $117.77 paid to the respondent by the United States on July 16, 1951 (R. 3, 5). Thereafter the respondent on May 14, 1953, filed suit in the District Court against the United States under the Tucker Act, demanding judgment in the amount of $1143.03 due and owing on the 1950 shipment (R. 3-4). The substitute answer filed by the United States admitted the respondent's performance of the 1950 transportation service and the correctness of the respondent's charges therefor (R. 5). However, in this answer the petitioner denied that the sum of $1143.03 was due and owing, claiming that the respondent was allowed

the full amount of the sum sued upon with $117.77 being paid by check in 1951 and the balance of $1025.26 being credited under the provisions of section 322 of the Transportation Act of 1940, on account of alleged overpayments previously made by the United States on certain designated transportation bills submitted by the respondent for the transportation of goods in 1944 (R. 5-6). The answer set forth as the grounds for the petitioner's determination of overpayment the statement that charges in the 1944 bills had been computed on the basis of the size of the freight car furnished and used and not on the basis of the size of the car ordered by the United States (R. 6). The petitioner further alleged in its answer that the respondent at no time furnished the Government with facts respecting its failure to supply cars of the size ordered (R. 6). To this pleading the respondent filed a reply admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944 (R. 6-7). The respondent further alleged that the "defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto," and that "the plaintiff . . . fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation" (R. 6-7).

In 1942, as a wartime measure to effect economies in the use of railroad cars, the Interstate Commerce Commission issued Service Order No. 68, which suspended the provisions of section 6(a) of Rule 34 of the rules of the Interstate Commerce Commission (App. A, pp. 16-17). In pertinent part this latter rule specified that, if a carrier was unable to furnish a car of the length ordered and therefore substituted a longer car, it could legally charge the shipper

only on the basis of the size of the car ordered (App. A, pp. 17-18). With the suspension effected by Service Order 68 the carrier could thereafter legally make charges for the size of the car furnished in those instances where it was unable to supply a car of the length ordered (App. A, p. 17).

With respect to the 1944 shipments it appears that the initial carrier had furnished on each occasion a car of greater length than that ordered, and subsequently the respondent, as the terminal carrier, had presented bills to the Government at the rate applicable to cars of the size furnished (R. 24-25, 26, 28, 30, 31-32). Pursuant to section 322 of the Transportation Act of 1940 these bills were paid (R. 25, 27, 29, 30, 32). Some six years later, however, the bills were post-audited by the General Accounting Office and, without undertaking to determine the important extrinsic fact necessary to establish that there had, in fact, been an overcharge in 1944, namely, whether the initial carrier was able to supply freight cars of the smaller sizes ordered, the General Accounting Office made a deduction from a bill submitted by the respondent in June, 1951 (covering charges on the 1950 transportation sued upon), in the amount of the difference between the charges for the cars ordered and those furnished (R. 25, 26, 27, 28, 29, 30, 31, 32, 33; App. A, p. 22).

On these facts and the state of the pleadings before it, the District Court ruled that, in order for the plaintiff to recover, it need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay (R. 39). The Court reasoned that, since the plaintiff had brought suit upon a particular contract of transportation, other contracts claimed by way of set-off or otherwise would have to be set up in the defendant's answer and proved by the defendant (R. 39).

Thereafter the Railroad filed a motion for summary judgment with affidavit attached demanding judgment in the sum of $402.84,[1] and the United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein" (R. 41-43). On November 23, 1955, the District Court entered judgment for the Railroad in the reduced amount of $402.84 and at the same time denied the petitioner's motion for judgment (R. 43-44). The Court of Appeals affirmed (App. A, p. 23).

In its opinion the Court of Appeals rejects the construction of section 322 urged upon it by the petitioner to the effect that, when a deduction is made by the Government upon post audit against an amount due the carrier on another transaction, then in order for the carrier to recover the amount admitted due on the subsequent transaction it would have the burden of alleging and establishing that there was no overpayment in the prior transaction used by the Government by way of set-off (App. A, p. 21). The Court found "no language in § 322 justifying this extraordinary result" (App. A, p. 21). The Court reasoned that this would upset the established order of things; and that, if the intent of Congress had been to accomplish such result, it certainly would have used appropriate language to that end (App. A, pp. 19-22). In the Court's view "all that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit" (App. A, p. 21).

[1] The reduction in the respondent's demand for judgment resulted from administrative negotiations wherein the parties agreed that the Government should be allowed a credit of $622.42 (R. 39-41).

Argument.

The record in this case generates no compelling reason for the issuance of a writ of certiorari.

1. There is no conflict between the holding in this case and any decision of this Court.

2. There is no conflict between the holding in this case and any decision of the other Courts of Appeals or other lower federal courts whose judgments are final in the absence of Supreme Court review.

3. This case has been given inflated importance.

4. The decisions of the Courts below in this case are correct.

1.

Despite the efforts of the petitioner from the very outset to confuse the real issue of the litigation in question, the Railroad sued the Government to collect for services rendered in 1950, not 1944. It was the Government that brought 1944 into the picture.

There is no conflict between the holding of the Court of Appeals and any decision of this Court. The Court of Appeals here held that the Government must be treated as any private shipper. This Court has not held to the contrary. That the United States, as a party litigant, must be treated as any private party has been the longtime holding of this Court; and which was so ably expressed by Mr. Justice Holmes in *United States v. Norwegian Barque "Thekla," Her Tackle, Etc.*, 266 U.S. 328:

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

The petitioner construes the case of *Grand Trunk Western Railway Co. v. United States*, 252 U.S. 112, as "strikingly analogous to the case at bar". (Petition, p. 9). A careful reading, however, shows that to be a distorted conclusion. That suit was brought in the Court of Claims (53 Ct. Cl. 473) to "recover the amount" deducted for the twelve years. In the case at bar the suit was not to recover the amount deducted because of the 1944 charges; rather, it was to collect charges admittedly due for 1950 services. In the *Grand Trunk* case the balances due for carrying the mails were regarded as running accounts under successive contracts. That is not so in the case at bar, where the suit was on a 1950 contract and the Government set-off was on a 1944, and in no way related, contract. Likewise, as to the *Grand Trunk* case the petitioner here arrives at an extraordinary conclusion concerning the impact of the Court's holding that the United States (Postmaster) "was under no obligation to establish the illegality by suit." The petitioner would have us believe that the Court meant that the United States did not at any time have to establish the fact of overpayment in any kind of lawsuit and no matter under what circumstances the question of overpayment arose; whereas the respondent says that the true construction of that holding is that as a first step to the act of making the deduction there is no requirement that the Government institute legal action against the carrier to bring about a determination that in fact there was an overpayment. Stated another way, the Government can make its own determination of overpayment without making any offer of proof as to the basis for such determination, unless and until it asserts such overpayment as set-off in a judicial proceeding. At such time it must meet the requirements of such proceeding.

The respondent's construction is supported by the language of the Court of Appeals decision in our case (App. A, p. 22):

> "This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment."

The petitioner asserts that the holding of the Court below conflicts with several cases cited on pages 11 and 12 of its petition in which this Court applied to the facts before it the general rule of evidence that, when certain facts lie peculiarly within the knowledge of one of the parties to litigation, that party has the burden of coming forward with evidence as to those facts. However, even a most casual reading of these cases demonstrates that the professed conflict is not a real conflict. On the contrary, the fact situation and legal issues involved in each case cited differ from those present in the other cases and are in no respect similar to the facts and issues in the case at bar.

Further, we believe that this Court will agree there is not even a conflict in principle between our case and the cited authorities. In the opinion below the Court of Appeals carefully explored the propriety of applying that rule of evidence to the instant case and expressly found that the state of the record did not justify such a result (App. A, pp. 23, 24). The Court of Appeals prefaced its discussion on this phase of the case with the statement: "Of course, rules as to burden of proof, rebuttable presumptions, burden of going forward with the evidence, etc., are established as matters of fairness, and convenience or availability of proof"[1] (App. A, p. 23). It then indicated that, if as a fact the evidence as to availability of cars of the size ordered was peculiarly within the knowledge of the

[1] See also Wigmore on Evidence, vol. IX, sec. 2486, p. 275.

carrier, it might be fair to impose upon the carrier the burden of coming forward with such evidence. But, as the Court found, "That does not seem to be so in the case of the present appellee-plaintiff, which was the terminal carrier, not the initiating carrier" (App. A, p. 24). In the absence of any direct evidence in the record showing as a fact that the carrier was in possession of the information as to availability at the time and place of shipment of cars of the size ordered, the Court of Appeals was impressed with the fact that the General Accounting Office had been "painfully slow" in post-auditing 1944 transportation bills, consuming a period of six years before statement of overcharge was made; whereas the carrier was not required by law to keep records more than three years (App. A, p. 24).

2.

There is no conflict between the decision in the case at bar and decisions rendered by other Courts of Appeals or lower federal courts whose judgments are final in the absence of Supreme Court review. Quite to the contrary, it is to be noted that the only other case on all fours with the case at bar was decided in conformity with the decision below.

In *Atlantic Coast Line R. Co. v. United States* (1956), 140 F. Supp. 563, the Court of Claims stated at page 572:

> "Since the Government is seeking to set off, against an admittedly valid claim, a claim which it asserts arises out of another transaction, it has the burden of persuading us as to the validity of its offset."

In the case at bar the Court of Appeals, noting its agreement with the *Atlantic Coast Line* case, quoted with ap-

proval the language of the Court of Claims set out above (App. A, p. 22).

3.

The petitioner attaches an inflated importance to the issue of this case. It cited the dollar value of the large number of notices of overpayment issued by the General Accounting Office (Petition, p. 8, and footnote 5)—for a period, incidentally, that has no bearing here. Yet for some reason it does not recite the number of instances when the overpayments encompassed by that same tabulation were not disputed by the carrier. The respondent suggests that the percentage of real controversy between the Government and the carriers over notices of overpayment as compared to the total transportation charges is of minor significance. Take this case, for instance. The total amount of the Government set-off was $1025.26. The respondent had no quarrel with the Government's reason for wanting to set off $622.42 of that amount. Thus the judgment below was for $402.84. That state of affairs does not create any "crucial" situation as the petitioner contends.

Nowhere in its opinion did the Court of Appeals conclude as contended by the petitioner at page 7 of the petition that "prompt, unaudited payment by the Government, pursuant to Section 322, permanently frees the carrier of the burden of justifying its charges . . ." What it did conclude was that, in those instances where the carrier would have such a burden prior to the enactment of section 322, this was to be the case after passage of section 322, and that, on the other hand, in those cases where the burden would have been upon the Government to show an overpayment prior to section 322, this same situation would prevail after the date of section 322. The Court concluded that the particular facts of the present case placed it within the latter category mentioned above.

4.

The ruling of the District Court upon the pleadings before it and the contentions then advanced by the parties was the only ruling consistent with logic and sound reasoning. As that Court recognized, the issue before it was not complex (R. 34-35). The pleadings had framed for its decision a simple issue of pleading and proof. It did not feel required to pass on the narrow question of the proper assignment to the parties of burden of proof or burden of evidence as to each and every particular fact, since the United States had contended that, on the circumstances of the case, before the Railroad could recover, it had to "plead" facts with regard to prior transactions between the parties and in addition make an overall showing that the Government had not overpaid the Railroad on any of these prior transactions (R. pp. 36-38). The Court rejected this contention in the following terms:

> "I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of setoff or otherwise must be set up in the defendant's answer and proved by the defendant." (R. p. 39.)

The respondent submits that the correctness of this ruling is immediately evident. To engage in lengthy discussion in justification thereof would only labor the point.

Likewise the decision of the Court of Appeals is clearly correct and unimpeachable by the petitioner. In a well-reasoned opinion that Court carefully considered and dis-

posed of all the outstanding issues and contentions of the parties, including those now urged upon this Court by the Government.

As previously mentioned, it found, contrary to the misleading recitation of the petitioner, that prior to the enactment of section 322 the burden of establishing the correctness of its charges was by no means necessarily cast upon the carrier in every case where a dispute between it and the United States as to transportation charges was ultimately brought into a court of law.

The Court of Appeals then considered the legislative history and wording of section 322 and concluded that that section was directed primarily to the administrative phase of payment and settlement of accounts between carriers and the Government; that is, it conferred upon the agents of the United States authority to make payment upon presentation, substituting a post-audit for a pre-audit, and, in addition, confirmed the pre-existing right of the Government to deduct any amount of administratively determined overpayments from subsequent transportation bills. This section, however, was not intended to have a further effect once a dispute as to proper charges had been transferred from the administrative stage to a judicial proceeding.

Concededly, the Congress which enacted section 322 knew that according to the prevailing practice the United States did not pay for transportation charges until after they had been audited.[1] And presumably it understood that, when called upon, the carrier would have to furnish certain facts to sustain its charges in order to receive payment

[1] Although, as the Court points out at page 20 of App. A, under the terms of section 3 (2) of the Interstate Commerce Act the carrier was not required to relinquish possession of a shipment prior to payment even in those instances where the United States was the shipper.

without recourse to litigation. If litigation eventually would ensue under the pre-section 322 practice, then it might be correct to say that in the usual course of events the carrier would be the party who would institute suit, since it had not been paid for services rendered. And as the suitor the carrier would unquestionably have the burden of proof as to the elements of its claim. In this respect the Government policy as to payment of claims is significant because in a sense the burden of proof and the burden of allegation are incident to and follow the fact of payment or withholding of payment. Rules of evidence do not operate in a vacuum but are allocated to one party or the other depending upon the context of their actions. But, even if Congress, while being well apprised of the Government's policy of payment on the administrative level, also knew of the practical effect of this policy of payment on later judicial proceedings between the carrier and the Government, it most certainly does not follow that, by changing administratively the Government's payment policy from pre-audit to post-audit, it intended to change the judicial incidents flowing from the fact of payment or lack of it. If that were the intent of Congress, it would have specified in plain language that in every case where litigation ripened from previous administrative dealings of the parties, no matter who instituted it, the carrier must always carry the burden as to the correctness of its charges.

Rather than give such an interpretation to section 322—which specifies nothing regarding burden of proof, nothing regarding procedure in litigation between carriers and the United States—the Court of Appeals adopted the only reasonable construction, *i.e.*, that the inclusion of that paragraph of section 322 relating to deductions was dictated by an abundance of caution to guard against the hazard of a possible interpretation that Congress had legis-

lated out of existence the traditional right of the United States to a set-off in situations where other suitors would enjoy a like right.

The effect of section 322, as recognized in the Court's opinion, was to bring the United States into closer parity to private shippers. If they must pay transportation charges prior to an investigation as to their correctness, and wait to sue for or deduct the amount of any overpayment, so too must the United States after the enactment of section 322. From the point of view of the carriers this is admittedly a desirable result and one which Congress for overriding considerations might freely choose to confer. Having done so, as the Court of Appeals found, no specious argument of the Government should now serve to take away that right.

Conclusion.

The decision of the Court below is clearly correct. There is no conflict of decisions. The petitioner has failed to present with accuracy, brevity and clearness any considerations warranting a further review. Therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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